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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

WOLFGANG WILLIAM BRAB - - - *Petitioner*

versus

JANE D. HILL - - - - - - - - *Respondent*

On Petition for Writ of Certiorari
To the Commonwealth of Kentucky
Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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September 9, 1997

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35 pp

QUESTION PRESENTED

Whether the Federal Arbitration Act (FAA), 9 U.S.C. Sec. 1 *et seq.*, compels arbitration, based upon an arbitration agreement in a securities industry application, of a claim of sexual assault and battery, arising during a employment relationship against a supervisor, which is held arbitrable as against the employer along with related claims of sexual harassment and retaliation.

LIST OF PARTIES

Parties before this Court

Wolfgang William Brab, Petitioner

Jane D. Hill, Respondent

Parties to the Proceeding Below

(Commonwealth of Kentucky Court of Appeals
No. 95-CA-000898)

Jane D. Hill, Appellant

J.J. B. Hilliard-W.L. Lyons, Inc.,
Wolfgang William Brab,
James C. Stone III,
Gilbert L. Pamplin, Appellees

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

WOLFGANG WILLIAM BRAB, - - - - - - - *Petitioner*

v.

JANE D. HILL, - - - - - - - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH OF KENTUCKY COURT OF APPEALS

W. Wolfgang Brab respectfully petitions for a writ of certiorari to review the judgment of the Commonwealth of Kentucky Court of Appeals, as modified, in this case.

OPINIONS BELOW

The opinion of the Kentucky Court of Appeals (App., *infra*, 3a-10a as Modified) is reported at 945 S.W.2d 948. The denial of discretionary review by the Supreme Court of Kentucky (App., *infra*, 1a) and the order of the Jefferson Circuit Court reviewed by the court of appeals (App., *infra*, 3a) are unreported.

JURISDICTION

The Supreme Court of Kentucky entered its order denying discretionary review of the Opinion of the Court of Appeals (as Modified, September 20, 1996) on June 11,

1997 (App., *infra* 1a). The jurisdiction of this Court is invoked under 28 U.S.C. sec.1257.

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act (FAA), 9 U.S.C. Sec. 1 *et seq.*, provides in relevant part that "A written provision in any * * * contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract * * * *, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 3 of the FAA provides in relevant part that "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration had been had in accordance with the terms of the agreement * * * * *.

STATEMENT

Respondent, an officer and employee of J.J.B. Hilliard, W.L. Lyons, Inc. ("Hilliard Lyons"), a regional brokerage firm, sued the employer, Hilliard Lyons; Petitioner, her immediate supervisor at Hilliard-Lyons; the chief executive officer and another executive officer of Hilliard Lyons in September, 1994, in the Circuit Court of Jefferson County, Kentucky. In her complaint, she sought compensatory and punitive damages for alleged assault and battery and intentional infliction of emotional distress, and for alleged sexual harassment, retaliation and equal pay violations of the Kentucky Civil Rights Act, KRS Chapter

344, against Petitioner, Hilliard Lyons and the other individual defendants. She also sought damages for alleged false imprisonment against Petitioner only.

A. Material Facts

This case involves the scope of arbitrability pursuant to an arbitration agreement in a securities registration application in light of *Gilmer* v. *Interstate/Johnson Lane Corporation*, 500 U.S. 20 (1991) and a proliferation of subsequent cases in the federal and state courts. The issue is here is the arbitrability of a sexual assault and battery claim held arbitrable as against the employer along with related statutory claims of sexual harassment pursuant to the FAA and *Gilmer* but not as against the supervisor.

Hilliard Lyons is a brokerage firm and member organization of the major stock exchanges. As a condition of her employment, Respondent was required (as was each of the individual parties in this case) to register as a securities representative with self-regulatory organizations, including two stock exchanges, by completing and signing Form U-4, "Uniform Application for Securities Industry Registration or transfer." By signing the form, respondent agreed to submit any dispute, claim or controversy between Hilliard Lyons and herself to arbitration. Respondent agreed as follows:

> 5. I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm or a customer or any other person that is required to be arbitrated under rules, constitutions or by-laws of the organizations listed in Item 10 as may be amended from time to time and that any arbitration award entered against me may be entered as a judgment in a court of competent jurisdiction.

The "organizations listed in Item 10" are the American Stock Exchange, the National Association of Security Dealers and the New York Stock Exchange. Rule 347 of the New York Stock Exchange Rules provides:

> Any controversy between a registered representative and any member or member organization *arising out of employment* or termination of employment of such registered representative by and with such member or member organization *shall be settled by arbitration,* at the instance of any such party, in accordance with our arbitration procedure proscribed elsewhere in these rules. (Emphasis supplied).

The National Association of Securities Dealers has a similar rule.

The following allegations in Respondent's Complaint and in Petitioner's Answer and Counterclaim filed in the trial court are pertinent to this petition:

1. Having initially been employed by Hilliard Lyons as a stockbroker, Respondent applied for an executive position in Petitioner's department. Petitioner selected her for the position and became her immediate supervisor beginning in February, 1993. (Complaint, paragraphs 9-14.) (Answer, paragraphs 5, 6, and 9.)

2. In September 1993, Petitioner and Respondent took a business trip to attend a Securities Industry Association conference in New York. One night, during the conference, the two were joined by other conference attendees for dinner and drinks. Sometime after midnight, Petitioner escorted Respondent back to the hotel. (Complaint, Paragraphs 17, 19.) (Answer, Paragraphs 12, 13.)

3. Upon their return to the hotel, Respondent alleges that petitioner raped her when, due to a combination of alcohol and medication, she was not able to defend herself. (Complaint, paragraph 19).

4. Petitioner denies having raped Respondent, acknowledges a sexual encounter which he states was consensual, invited, welcomed and encouraged by Respondent (Answer, paragraph 13.)

5. Nearly three weeks after their return to Louisville, Respondent reported the alleged sexual assault to another executive officer at Hilliard Lyons. She alleges that this officer failed to advise her of the company's sexual harassment policy and in fact physically caressed and otherwise sexually harassed her during that meeting. (Complaint, paragraphs 23-25).

6. Shortly thereafter, the chief executive officer of Hilliard Lyons advised her that an investigation of her complaint had been commenced and assured her that Petitioner would have no further authority over her. (Complaint, paragraph 27).

7. Respondent further pled that Hilliard Lyons and responsible executive officers, including petitioner, retaliated against her for complaining about the alleged sexual assault and otherwise treated her disparately with respect to her wages, hours and terms and conditions of employment because of her sex.

8. In March, 1994, Respondent filed a sexual harassment complaint with EEOC. (Complaint, paragraph 46.) Shortly thereafter, Petitioner resigned from Hilliard Lyons following a meeting of the Board of Directors. (Complaint, paragraph 47.)

Respondent claims assault and battery by petitioner. She joins as tortfeasors in this claim Hilliard Lyons and the other individual parties, alleging that they ratified the alleged rape and should be held jointly liable. Complaint, paragraphs 51, 52). She alleges intentional infliction of emotional distress, sexual harassment, retaliation and equal pay violations in connection with the alleged assault and battery incident against all parties including petitioner. Petitioner counter-claimed against respondent for slander *per se*.

B. Proceedings Below

In the Kentucky trial court, Petitioner moved for judgment on the pleadings and all other defendants moved to dismiss, or, alternatively, to defer the case to arbitration, on the basis of *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). The Jefferson Circuit Court entered an Order finding that all of Respondent's claims arose out of her employment and were therefore subject to the mandatory arbitration agreement all individual parties had signed, pursuant to *Gilmer*. For procedural reasons, Respondent requested, and the court granted, her motion to dismiss her action by amended order entered March 6, 1995.

The Kentucky Court of Appeals remanded to the trial court the allegations of assault and battery and false imprisonment against petitioner. It affirmed the trial court Order dismissing/deferring to arbitration the assault and battery claim against Hilliard Lyons and the other individual appellees, the tort claim for intentional infliction of emotional distress against petitioner and all other parties and all of the alleged statutory violations against all of the appellees, finding that all of these allegations arose out of Respondent's employment.

In remanding two of the three intentional tort claims brought against petitioner, the Court of Appeals panel acknowledged that they "too, have struggled with the same problems and reasoning" [that the trial court had struggled with, including the fact that Respondent had never filed criminal charges against petitioner, that she had instead first prosecuted her claim with EEOC, an agency whose domain is limited to discrimination claims arising out of employment, and that she had interwoven her claims against Petitioner with those against the employer]. The Court of Appeals opined, nevertheless, that the alleged offenses of assault and battery and false imprisonment

against petitioner could not be considered as "arising out of the employment" *Hill* v. *Hilliard*, 945 S.W. 2d. 948,952 (Ky App. 1996) (Slip Opinion, p. 8).

Subsequently, Petitioner filed a timely Petition for Rehearing and/or Modification or Extension of opinion to remand to the trial court, without waiving his right to seek further appellate review, his counterclaim for slander per se, in light of the court's remand of the battery and false imprisonment claims. On September 20, 1996, the Court of Appeals granted the petition to modify, stating that "[to] the extent that his counterclaim relates to the charges brought by Hill now to be heard in Jefferson Circuit Court, it shall remain part of the action on remand." Opinion, p. 9.

A Motion for Discretionary Review was timely filed with the Supreme Court of Kentucky by Petitioner arguing that the *Gilmer* decision and subsequent cases in the federal courts compelled arbitration of all of Respondent's claims and that the failure of the Court of Appeals to resolve its "doubts concerning the scope of arbitrable issues in favor of arbitration" was in clear violation of the Federal Arbitration Act. Respondent also filed a motion with the Supreme Court of Kentucky submitting that her claims did not arise out of the course of her employment and that all of her claims should be remanded to the trial court. Both motions were denied by the Supreme Court of Kentucky.

REASONS FOR GRANTING THE PETITION

The Kentucky Court of Appeals decision in this case is in conflict with *Bender* v. *Edwards Sons, Inc., 971* F.2d 698 (11th Cir. 1992) and with *Bachus and Stratton, Inc.* v. *Mann*, 639 So.2d 35 (Fla. App. 4 Dist., 1994). Inside and outside the securities industry, conflicting decisions are emerging in the federal circuit and district courts and in the state courts concerning the arbitrability of common

law tort claims arising during the pendency of an employment relationship, particularly when brought in conjunction with statutory claims relating to the same constellation of facts or incidents. The need for direction from this Court is urgent. Additionally, the decision below is erroneous and the issue that it addresses is important.

I. The Kentucky Court of Appeals' Interpretation of the Requirements of the FAA Concerning an Arbitration Agreement in a Securities Industry Application Conflicts with the Eleventh Circuit's Interpretation and Aggravates the Splits of Authority in the Federal and State Courts

Since this Court's landmark decision in *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), there has been a virtual avalanche of litigation in the federal and state courts concerning the issue of compulsory arbitration of claims of discrimination in employment, including sexual harassment, and other claims arising during the pendency of the employment relationship involving the same or related incidents and facts. In *Gilmer*, this Court held that a registration agreement entered into between a stock broker and a stock exchange providing for mandatory arbitration of all employment related disputes can require arbitration of claims arising under the federal Age Discrimination in Employment Act (ADEA).

Subsequently, the federal circuit courts have overwhelmingly held that sexual harassment claims and other claims of discrimination under Title VII and/or parallel state anti-discrimination statutes are subject to mandatory arbitration agreements, based on *Gilmer*, cf., *Alford* v. *Dean Witter Reynolds, Inc.*, 939 F. 2d 229 (5th Cir. 1991 (sexual harassment and sexual discrimination claims); *Willis* v. *Dean Witter Reynolds*, 948 F. 2d 305 (6th Cir., 1991)(Sexual harassment and sexual discrimination claims, common law tort of outrage, breach of contract; *Mago* v. *Shearson*

Lehman Hutton, Inc., 956 F. 2d 932 (9th Cir. 1992) (sexual harassment and gender discrimination claims); *Bender* v. *Edwards Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992) (sexual harassment claims and tort claims for battery and intentional infliction of emotional distress); *Patterson* v. *Tenet Healthcare, Inc.*, 113 F. 3d 832 (8th Cir. 1997) (discrimination and retaliation claims); *Metz* v. *Merrill Lynch, Pierce, Fenner & Smith*, 39 F.3d 1482 (10th Cir. 1994) (pregnancy discrimination claims under Title VII); *Cole* v. *Burns Intern Security Services*, 105 F.3d 1465 (D.C. Cir. 1997) (racial discrimination and harassment and retaliation re sexual harassment of a subordinate employee).

In the 11th Circuit, a tort claim for battery against a supervisor with factual allegations apparently identical to the allegations in this case was held arbitrable following *Gilmer*. In *Bender* v. *A.G. Edwards & Sons, Inc.*, 971 F2d. 698 (11th Cir. 1992), plaintiff had filed a complaint in the federal court below alleging battery and sexual harassment by her supervisor and sought relief under Title VII and pendant law state claims of battery, intentional infliction of emotional distress and neglect retention. The district court below determined that the battery claim was subject to arbitration, *Bender*, 971 F. 2d at 699; however it held that the Title VII claim was not subject to arbitration. On appeal, the Eleventh Circuit upheld the motion to compel arbitration of the Title VII claims as well as the intentional tort claims, based on *Gilmer*, 971 F.2d at 700.

In *Bachus & Stratton, Inc.* v. *Mann*, 639 So. 2d 35 (Fla. App. 4 Dist. 1994), a Florida appeals court confronted factual allegations virtually identical to those alleged in this case. The plaintiff, a former account executive of a securities brokerage filed an action against the employer and two account executives alleging assault and battery, intentional infliction of emotional distress, defamation, invasion of privacy and sexual discrimination. The *Bachus* court

stated that it was following the "significant aspects of the employment relationship" test set forth by the 2d Circuit in *Fleck* v. *E.F. Hutton Group, Inc.,* 891 F2d. 1047 (2d Cir. 1989) in upholding mandatory arbitration of most of the claims, including the battery claim. The court opined as follows concerning the intentional tort claims filed against individual company executives, 639 So. 2d at 37:

> Finally we find no merit in Mann's argument that the alleged torts committed by [individual executives] were not arbitrable because they did not arise out of or in connection with the business of Bachus & Stratton Securities, Inc. Mann's complaint contained sufficient allegations to demonstrate her claims arose in connection with the business operations of her former employer.

So here, as the trial court found.

Several federal circuits have grappled with the issue of how to interpret New York Stock Exchange (NYSE) Rule 347's "arising out of employment" language, particularly when confronted with claims cast in tort. In *Zandford* v. *Prudential-Bache Securities,* 112 F.3d 723, 728 (4th Cir. 1997), the Fourth Circuit applied the test adopted by the Eighth Circuit in *Morgan* v. *Smith Barney, Harris Upham & Co.,* 729 F2d 1163, 1167 (8th Cir. 1984) which concluded that the language "arising out of" contained in Rule 347 requires arbitration of tort as well as contract claims which involve "significant aspects of the employment relationship." But the establishment of this test, though adopted by several circuits, has not brought about uniformity in the courts. In *Morgan,* the Court found plaintiff's tort claims of slander and invasion of privacy to involve significant aspects of the employment relationship. In *Aspero* v. *Shearson American Exp., Inc.*, 768 F2d 106, 109 (6th Cir., 1985), a pre *Gilmer* case, the Sixth Circuit held that when a party subject to NYSE Rule 347 seeks to compel arbitration of a claim not based on a contractual right or duty, the

question is whether resolution of the claim depends upon evaluation of the party's job performance. In *Pearce* v. *E.F. Hutton Group, Inc.* 828 F2d 826, 833 (D.C. Cir. 1987, another pre *Gilmer* decision, the D.C. Circuit noted that the Eighth Circuit [*Morgan*] decision did not purport to furnish a complete definition of "arising out of employment" and further noted that the Sixth Circuit's decision in *Aspero* "did not warrant the conclusion that any claim not depending upon one's performance as a broker does not arise out of one's employment. . . ."

The Seventh Circuit interprets the term "arising out of" as "reaching all disputes having their origin in the contract, whether or not they implicate interpretation or performance of the contract *per se.*" *Sweet Dreams Unlimited* v. *Dial-A—Mattress International, Ltd.,* 1 F.3d 639, 642 (7th Cir. 1993). The Seventh Circuit elaborates as follows:

> In fact, any dispute between contracting parties that *is in any way connected with their contract* could be said to "arise out of" their agreement and thus be subject to arbitration under a provision employing this language. (Emphasis supplied.) *Sweet Dreams Unlimited* v. *Dial-A-Mattress Intern.,* 1. F 3d at 642.

When sexual harassment claims based upon anti-discrimination federal and state statutes became almost uniformly held subject to mandatory arbitration agreements in employment by the federal circuit courts and numerous highest state courts after the 1991 *Gilmer* decision, understandable confusion was generated concerning the issue of arbitrability of pendant law tort claims having their genesis in the same sets of factual allegations giving rise to the sexual harassment claims. Consequently, the Eleventh Circuit in the *Bender* case and the Florida appeals court in the *Bachus* case deferred to arbitration claims of both sexual battery and sexual harassment, apparently finding that both claims were employment related at their

core. The Court of Appeals of Kentucky apparently disagrees, deferring the assault and battery claim against the employer along with sexual harassment claims against all parties while remanding the **same** assault and battery cause of action against petitioner to the trial court. This court should grant certiorari to review these conflicting results and provide needed guidance.

II. The Decision of the Court of Appeals Is Erroneous

In its Opinion, *Hill* v. *Hilliard*, Ky. App. 945 S.W.2d 948,951 (1996) (Slip Opinion, p. 5), the Court of Appeals correctly stated:

> Further, whenever an arbitration agreement exists, the Federal Arbitration Act establishes that, as a matter of law, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L. Ed.2d 765 (1983); See also *Asplundh Tree Co.* v. *Bates*, 71 F. 3d 592 (6th Cir. 1995).

In that portion of its decision vacating the dismissal by the Circuit Court of the individual tort claims against petitioner and remanding same to the trial court, the Court of Appeals failed to follow its own clear recognition of applicable federal law. The Court below made the following observations:

> The circuit court stated, and we agree, that rape does not ordinarily arise out of the employment context. Nevertheless, the trial court dismissed all claims for two reasons. Although [Respondent's] tort claims for assault and battery and false imprisonment arise most immediately from [Petitioner's] conduct, the ensuing chain of events and the course of action [respondent] chose to pursue were made in direct connection with her employment. [Respondent] elected not to pursue criminal charges against [Petitioner] or to sue him

> personally or exclusively. Instead she originally sought recourse through the EEOC.
>
> It is cogent that EEOC's sole domain is employment related matters, yet [Respondent] now contends that her claims do not arise out of her employment. The circuit court also was persuaded that [Respondent's] allegations against [Petitioner] were so interwoven with those against the other appellees that all claims could be found to have arisen from her employment. The video record indicates that Judge Knopf struggled with this problem, but finally concluded that the case should not be prosecuted piecemeal. All claims were to be subjected to arbitration.
>
> We, too, have struggled with this same problems and reasoning, but we nevertheless conclude that, in this situation, the alleged offense by [Petitioner] of rape, assault and battery, and false imprisonment were erroneously dismissed.

945 S.W. 2d at 952 (slip Opinion, p. 8). It is apparent from the court's discourse as stated above that the Court of Appeals panel **also had doubts** concerning the scope of arbitrability in this case which they resolved, contrary to the mandates of federal law, **against** arbitration, rather than in favor of arbitration.

III. The Question Presented Is Important

Justice Scalia has observed that "[n]othing is more wasteful than litigation about where to litigate." *Bowen* v. *Massachusetts,* 487 U.S. 879, 930 (1988) (dissenting opinion.) Subsequent to *Gilmer,* and in accordance with the clear policy espoused in that case in favor of arbitration, federal and state courts have overwhelmingly deferred statutory sexual discrimination claims in employment, including sexual harassment claims to arbitration. Considerable confusion still reigns, however, concerning what to do about related tort claims, frequently filed against one individual in the same lawsuit as claims for substantial money

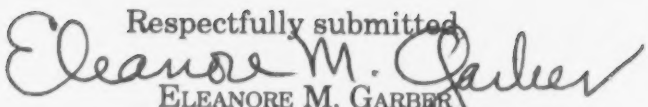
damages for employment discrimination against employers. All too often, all of the claims have their genesis in the same or related factual disputes. The pendent tort claims would ordinarily never have been brought in any forum, absent an employment relationship, and often the real objective is to target the "deep pocket" of the employer, not to bring to justice an individual allegedly culpable of criminal conduct. Yet, the alleged individual tortfeasor is required to defend similar claims based upon a common factual scenario in two forums, in arbitration and in the courts.

Cases where all litigants are parties to arbitration agreements and which present related statutory and common law claims should not continue to be resolved piecemeal, erroneously so, with consequent duplication of effort and unnecessary drain of both financial and emotional resources. Furthermore, presently, determination of whether a tort claim is deferred to arbitration or remanded to the courts depends less on clear, consistent interpretation of the requirements of the Federal Arbitration Act than upon the particular rule in the jurisdiction or venue where the action is filed. Resolution of the federal issue before this court and a decision by this court compelling enforcement of valid arbitration agreements to resolve employment related claims which are factually related is necessary to promote uniformity in both the federal and state courts and to preserve valuable resources of both litigants and the courts. For all of these reasons, the Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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(502) 585-5100
Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Eleanore M. Garber, a member of the Bar of this Court, hereby certify that on this 9th day of September, 1997, three copies of the Petition for Writ of Certiorari in the above entitled case were mailed, first class postage prepaid, to Ivan H. Rich, Jr., Esq., Rich & D'Ambrosio, PSC, Sterling Place Business Park, 3044 Breckinridge Lane, Suite 103, Louisville KY 40220, Counsel for Respondent, and to Walter L. Sales, Esq., Ogden, Newell & Welch, 1200 One Riverfront Plaza, Louisville, KY 40202, Counsel for all parties other than Petitioner and Respondent. I further certify that all parties required to be served have been served.

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APPENDIX

SUPREME COURT OF KENTUCKY

96-SC-922-D
(95-CA-898)

JANE D. HILL - - - - - - - - - - - *Movant*

v.

J.J.B. HILLIARD, W.L. LYONS, INC.,
JAMES C. STONE, III,
GILBERT L. PAMPLIN, and
WOLFGANG WILLIAM BRAB - - - - - - *Respondents*

AND

96-SC-923-D
(95-CA-898)

WOLFGANG WILLIAM BRAB - - - - - - - *Movant*

v.

JANE D. HILL - - - - - - - - - - *Respondent*

Jefferson Circuit Court
No. 94-CI-5086

ORDER DENYING DISCRETIONARY REVIEW

The motions for review of the decision of the Court of Appeals are denied.

ENTERED: June 11, 1997.

/s/ Robert F. Stephens
Chief Justice

COURT OF APPEALS OF KENTUCKY

95-CA-0898-MR

JANE D. HILL - - - - - - - - - - *Appellant*

v.

J.J.B. HILLIARD, W.L. LYONS, INC.;
WOLFGANG WILLIAM BRAB;
JAMES C. STONE, III; and
GILBERT L. PAMPLIN - - - - - - - - - *Appellees*

Appeal From Jefferson Circuit Court
Honorable William Knopf, Judge
Civil Action No. 94-CI-5086

ORDER GRANTING PETITION TO MODIFY OPINION/DENYING REQUEST FOR REHEARING

BEFORE: WILHOIT, Chief Judge; COMBS, and HOWERTON, Judges.

Appellee, Wolfgang William Brab, has petitioned for rehearing and/or modification or extension of this Court's opinion in the captioned case rendered June 21, 1996, to which no response was filed. Agreeing with Brab's request to modify the opinion, it is hereby GRANTED, and the attached pages 1 and 9 are ORDERED substituted for pages 1 and 9 and page 10 added to our original opinion.

The request for rehearing is hereby DENIED.

ENTERED: September 20, 1996

/s/ Anthony M. Wilhoit
Judge, Court of Appeals

RENDERED: JUNE 21, 1996; 2:00 P.M.
TO BE PUBLISHED
MODIFIED: SEPTEMBER 20, 1996; 10:00 A.M.

COURT OF APPEALS OF KENTUCKY

95-CA-0898-MR

JANE D. HILL - - - - - - - - - - *Appellant*

v.

J.J.B. HILLIARD, W.L. LYONS, INC.;
WOLFGANG WILLIAM BRAB;
JAMES C. STONE, III; and
GILBERT L. PAMPLIN - - - - - - - - *Appellees*

Appeal From Jefferson Circuit Court
Honorable William Knopf, Judge
Civil Action No. 94-CI-5086

OPINION—AFFIRMING IN PART; VACATING AND REMANDING IN PART

BEFORE: WILHOIT, Chief Judge; COMBS, and HOWERTON, Judges.

HOWERTON, JUDGE. Jane Hill appeals from an order of the Jefferson Circuit Court dismissing her claims of sexual assault and battery, false imprisonment, intentional infliction of emotional distress, along with sexual harassment, retaliation, and violation of the equal pay law under KRS Chapter 344. The circuit court determined that the claims arose out of Hill's employment and were therefore subject to mandatory arbitration. We vacate the order as to the dismissal of the allegations of sexual assault and battery and false imprisonment against Wolfgang William Brab, and we remand for further proceedings. As to the dismissal of the other charges and parties, we find no error and affirm.

Hill was employed by Hilliard Lyons as a stockbroker in February 1991, and was elected to the position of vice-President of Branch Administration and Marketing in September of 1993. As a condition of her employment, Hill was required to register as a securities representative with self-regulatory organizations, including two stock exchanges, by completing and signing Form U-4, "Uniform Application for Securities Industry Registration or Transfer." By signing the form, Hill agreed to submit any dispute, claim, or controversy between Hilliard Lyons and herself to arbitration. Specifically, Hill agreed to the following provision:

> 5. I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm or a customer or any other person, that is required to be arbitrated under rules, constitutions or bylaws of the organizations listed in item 10 as may be amended from time to time and that any arbitration award entered against me may be entered as a judgment in a court of competent jurisdiction.

The "organizations listed in Item 10" are the American Stock Exchange, the National Association of Securities Dealers, and the New York Stock Exchange, all of which Hilliard Lyons is a member. Rule 347 of the New York Stock Exchange Rules provides:

> Any controversy between a registered representative and any member or member organization arising out of employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any party, in accordance with our arbitration procedure prescribed elsewhere in these rules.

The National Association of Securities Dealers has a similar rule.

Hill alleged that in October 1993, she was raped by her supervisor, W. William Brab, while they were attending a convention in New York. She further alleged that Brab threatened her that if she told anyone of the incident, she

would lose her job. Hill eventually reported the alleged incident to a Hilliard Lyons Executive Vice-President, James C. Stone, and the Board Chairman, Gilbert L. Pamplin, and was given assurances that her complaint would properly be resolved. However, following the meeting, Hill alleged that she had to continue working in the office next to Brab, that she was required to appear at an awards presentation with Brab, and that she was given a bonus which was substantially less than she had been promised upon accepting the position. Hill maintained that Brab continued to exercise retaliatory authority over her and that her job responsibilities were reduced.

Hill initially filed a charge with the Equal Employment Opportunity Commission (EEOC) in Louisville, alleging sexual harassment and retaliation against Hilliard Lyons and Brab. As a result, Hill stated that her job responsibilities were further reduced and many of her responsibilities were reassigned to a male counterpart. Subsequently, in September 1994, Hill filed an action in the Jefferson Circuit Court against Hilliard Lyons, Brab, Stone, and Pamplin, claiming assault and battery, false imprisonment, intentional infliction of emotional distress, along with sexual harassment, retaliation, and violation of the equal pay law under KRS Chapter 344. The appellees collectively moved to dismiss and defer the case to arbitration on the basis of *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, Ill S.Ct. 1647, 114 L.Ed.2d 26 (1991).

Following oral argument, the circuit court entered an order finding that Hill's claims arose out of her employment at Hilliard Lyons and were therefore subject to the mandatory arbitration agreement signed by Hill. On February 8, 1995, the court stayed the action pending completion of the arbitration proceedings. However, on march 6, the court entered an order dismissing all of Hill's claims. This appeal ensued.

Hill argues that the court erred in ruling that her claims were subject to mandatory arbitration under *Gilmer*, because they did not arise out of her employment and are

therefore outside the scope of the arbitration agreement. At the outset, we recognize that Hill has the burden of showing that her claims are not subject to arbitration.

> Congress has delegated broad powers to self regulatory organizations within the securities industry to police the conduct of their members. This broad legislative delegation of power strengthens the presumption that disputes among members of such organizations and individuals associated therewith are arbitrable.

Spellman v. *Securities, Annuities & Ins. Services, Inc.*, 8 Cal. App.4th 452, 464, 10 Cal. Rptr.2d 427, 435, *modified* 8 Cal. App. 4th 1198 (1992) (citing to *Francis* v. *Marshall*, 661 F.Supp. 773 (D. Mass. 1987)).

Further, whenever an arbitration agreement exists, the Federal Arbitration Act establishes that, as a matter of law, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Memorial Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983); See *also Asplundh Tree Co.* v. *Bates.*, 71 F.3d 592 (1995).

The United States Supreme Court in *Gilmer* v. *Interstate/Johnson Lane Corp., supra*, held that agreements in the securities industry by brokers to arbitrate claims arising out of employment are governed exclusively by the Federal Arbitration Act (FAA). Gilmer was a registered security representative with the New York Stock Exchange, who also had signed a Form U-4 as a condition of employment. When he was terminated at age 62, Gilmer filed suit alleging age discrimination in violation of the Age Discrimination in Employment Act. The Supreme Court determined that Gilmer's claim was subject to mandatory arbitration pursuant to the FAA.

The *Gilmer* holding and analysis has been consistently applied to actions under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, as well as discrimination cases under state law. The Sixth Circuit in Willis v. *Dean Witter Reynolds. Inc.*, 948 F.2d 305 (6th Cir. 1991), ordered arbi-

tration of sexual harassment and sexual discrimination claims under Chapter 344 of the Kentucky Revised Statutes and Title VI, along with Willis, common law tort claims of outrage and breach of contract. Willis indicated that the "outrage" occurred in the workplace. Likewise, in *Bender* v. *A.G. Edward & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992), the Eleventh Circuit relied on the rationale in *Gilmer* in holding that a stockbroker was required to arbitrate her sexual harassment claims under Title VII pursuant to her registration application with the National Association of Securities Dealers and the New York Stock Exchange. The court also ordered arbitration of Bender's state law claims for battery, intentional infliction of emotional distress, and negligent retention. The Bender opinion did not reveal where the battery occurred or the nature of the offense.

Hill argues that Gilmer did not affect the prior line of cases interpreting the "arising out of . . . employment" language of Rule 347. In support, Hill relies on *Morgan* v. *Smith Barney, Harris Upham &* Co., 729 F.2d 1163 (8th Cir. 1984), in which the Eighth Circuit determined that a claim must involve some connection with "customers or securities agencies" or a "significant issue of . . . [plaintiff's] job performance" to require mandatory arbitration. Id. at 1167. *See also Pearce* v. *E.F. Hutton Group, Inc.*, 828 F.2d 826 (D.C. Cir. 1987); *Fleck* v. *E.F. Hutton Group, Inc.*, 891 F.2d 1047 (2nd Cir. 1989); *Aspero* v. *Shearson Am. Express*, Inc., 768 F.2d 106 (6th Cir. 1985).

A thorough reading of the above decisions convinces us that Hill's reliance is somewhat misplaced. *Morgan* and subsequent decisions all espouse the standard by which to determine whether post-employment claims are subject to arbitration. In recognizing the difficulty in determining which post-employment claims should be subject to mandatory arbitration, the 2nd Circuit in Fleck relied on the *Morgan* test that there must involve "significant aspects of the employment relationship." These decisions are, to some extent, distinguishable from Hill's claims which arose during her employment with Hilliard Lyons.

We have no difficulty in concluding that all of Hill's claims against Hilliard Lyons, Stone, and Pamplin arose out of her employment. Hill's allegations of sexual harassment, retaliation, and violation of the equal pay law all relate to the alleged action or inaction Hilliard Lyons took as Hill's employer in response to her report of the incident in New York. These charges against Brab are likewise subject to arbitration. However, we cannot agree that Hill's other allegations against Brab arose out of her employment. The only connection those torts or crimes have with Hill's employment is that they were committed by a coworker and occurred while on a business trip.

The circuit court stated, and we agree, that rape does not ordinarily arise out of the employment context. Nevertheless, the trial court dismissed all claims for two reasons. Although Hill's tort claims of assault and battery and false imprisonment arise most immediately from Brab's conduct, the ensuing chain of events and the course of action Hill chose to pursue were made in direct connection with her employment. Hill elected not to pursue criminal charges against Brab or to sue him personally and exclusively. Instead, she originally sought recourse through the EEOC. It is cogent that the EEOC's sole domain is employment-related matters, yet Hill now contends that her claims do not arise out of her employment. The circuit court was also persuaded that Hill's allegations against Brab were so interwoven with those against the other appellees that all claims could be found to have arisen from her employment. The video record indicates that Judge Knopf struggled with this problem, but finally concluded that the case should not be prosecuted piecemeal. All claims were to be subjected to arbitration.

We, too, have struggled with the same problems and reasoning, but we nevertheless conclude that, in this situation, the alleged offenses by Brab of rape, assault and battery, and false imprisonment were erroneously dismissed. They simply cannot be considered as non-actionable in court as anything "arising out of the employment."

The mere fact that these tort claims might not have arisen but for the fact that the two individuals were together as a result of an employer-sponsored trip cannot be determinative. What Brab is accused of doing is independent of the employment relationship. We will not expand the arbitration agreement merely for the sake of efficiency. In this case, it is the Federal Arbitration Act and the contract that can be said to require a "piecemeal" resolution. *See Moses* v. *Cone Memorial Hosp.* v. *Mercury Constr. Corp., supra.*

In affirming part of the decision that Hill's claims must be subject to arbitration, we have not denied her access to a court. She can pursue her claims which are subject to arbitration, and if the result is somehow legally deficient, she may return to court for review. *Mitsubishi Motors Corp.* v. *Sale Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985).

We note that the order of the Jefferson Circuit Court, from which this appeal was taken, provided in part, "[b]y agreement of the Defendant, Wolfgang William Brab, his counterclaim shall be disposed of in a forum similar to that handling the Plaintiff's claims." Brab had filed a counterclaim against Hill for slander. To the extent that his counterclaim relates to the charges brought by Hill now to be heard in the Jefferson Circuit Court, it shall remain a part of the action on remand.

Accordingly, the order of the Jefferson Circuit Court dismissing Hill's action is vacated to the extent that it dismissed her personal tort claims of rape, assault and battery, and false imprisonment against Brab and remanded for further proceedings against him. As to the dismissal of the other charges and parties, the decision is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
FOR APPELLANT:
Ivan H. Rich, Jr.
Louisville, KY

BRIEF FOR HILLIARD LYONS:
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ORAL ARGUMENT FOR
HILLIARD LYONS:
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BRIEF AND ORAL ARGUMENT
FOR W. WILLIAM BRAB:
Eleanore M. Garber
Louisville, KY

RENDERED: JUNE 21, 1996; 2:00 P.M.

JEFFERSON CIRCUIT COURT

DIVISION NINE (9)

95-CA-0898-MR

JANE D. HILL - - - - - - - - - - *Plaintiff*

v.

J.J.B. HILLIARD, W.L. LYONS, INC.;
WOLFGANG WILLIAM BRAB;
JAMES C. STONE, III; and
GILBERT L. PAMPLIN - - - - - - - *Defendants*

ORDER—Entered February 8, 1995

This action is before the Court for a ruling on the motions of the Defendants to dismiss or in the alternative to stay proceedings. On the 6th day of February, 1995, oral arguments were heard by the Court and recorded on video tape 30-9-95 VCR 009 (10:14 10:55) . At the oral arguments, Ivan H. Rich, Jr. , appeared for the Plaintiff, Jane D. Hill, Scott T. Wendelsdorf, appeared for the Defendants, J.J.B. Hilliard, W. L. Lyons, Inc., James C. Stone, III, and Gilbert L. Pamplin, and Eleanore M. Garber, appeared for the Defendant, Wolfgang William Brab.

The Court having reviewed and considered the memorandums of law filed in the record, heard oral arguments, and being otherwise sufficiently advised, finds that the claims made in this lawsuit by the Plaintiff, Jane D. Hill, are subject to the mandatory arbitration agreement signed and agreed to by the Plaintiff known as Form U-4, "Uniform Application for Securities Industry Registration or Transfer". Under the specific facts of this case and applicable law, this Court finds that all of the Plaintiff's claims arise out of her employment at J.J.B. Hilliard, W.L. Lyons, Inc. and thus must be submitted for mandatory arbitration. *Gilmer* v. Interstate/Johnson Lane Corporation, 500

U.S. 20, 114 L.Ed 2d 26, 111 S.Ct. 1647 (1991). By agreement of the Defendant, Wolfgang William Brab, his counterclaim shall be disposed of in a forum similar to that handling the Plaintiff's claims.

THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that all claims in this action are hereby STAYED pending the completion of mandatory arbitration between all parties to this action.

This is a final and appealable Order, there being no just reason for delay.

Entered: February 8, 1995

/s/ William L. Knopf
William L. Knopf, Judge

c: Ivan H. Rich, Jr.
Scott T. Wendelsdorf
Eleanor M. Garber

JEFFERSON CIRCUIT COURT

DIVISION NINE (9)

94-CI-05086

JANE D. HILL - - - - - - - - - - - *Plaintiff*

v.

J.J.B. HILLIARD, W.L. LYONS, INC.;
WOLFGANG WILLIAM BRAB;
JAMES C. STONE, III; and
GILBERT L. PAMPLIN - - - - - - - *Defendants*

ORDER—Entered March 6, 1995

This Court, being fully advised in the premises, hereby amends its Order of February 8, 1995, staying this action. Defendants' Motions are granted. This is a final and appealable order and there is no just cause for delay.

/s/ Illegible
Judge, Jefferson Circuit Court

Date: March 6, 1995

Supreme Court, U. S.
FILED
OCT 14 1997
CLERK

No. 97-459

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

WOLFGANG WILLIAM BRAB, - - - *Petitioner,*

versus

JANE D. HILL, - - - - - - - *Respondent.*

On Petition for Writ of Certiorari
To the Commonwealth of Kentucky
Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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No. 97-459

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

WOLFGANG WILLIAM BRAB, - - - - - - - *Petitioner,*

v.

JANE D. HILL, - - - - - - - - - *Respondent.*

On Petition for Writ of Certiorari
To the Commonwealth of Kentucky
Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This is a cross petition arising out of the same facts as No. 97-450, *sub. nom Hill* v. *Hilliard, et al.* docketed on September 12, 1997. The cross petitions and the Kentucky Court of Appeals opinion adequately set forth the background necessary for this Court's consideration of the questions presented.

There is no material factual dispute. Both petitions arise essentially out of Hill's claims that Brab raped her while both were attending a securities industry meeting in New York and, when Hill subsequently reported the incident, Brab and his colleagues on the Board of Directors retaliated against her.

REASONS FOR DENYING THE PETITION IN THIS CASE

1. A Case Arising Out Of A Rape Should Not Be Decided By Securities Industry Arbitrators

It is important to emphasize what Brab's petition is really saying in this case. It amounts to an assertion that he can avoid being sued in court for raping a subordinate because a mandatory arbitration clause in an application requires that disputes "arising out of employment" be decided by his fellow securities industry executives.[1] It is hard to imagine a dispute more unsuited to resolution under the process approved of in *Gilmer*.[2] Presumably, if Brab had murdered Hill in addition to raping her, he would argue that the wrongful death suit should likewise be decided by securities industry arbitrators.

The proposition that *Gilmer* requires arbitration of Hill's rape claims against Brab is ridiculous on its face.

2. There Is No Conflict In The Lower Courts

Brab's petition is unable to cite a single case in which arbitration of a rape claim was deferred to arbitration. The two cases cited, *Bender* v. *Edwards Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992) and *Bachus & Stratton, Inc.* v. *Mann*, 639 So. 2d 35 (Fla. App. 4 Dist. 1944), are *per curiam* opinions and merely note pendent tort claims of assault and battery. For all that appears in these opinions, the tort claims are incidental to a garden variety employment dispute. There is no discussion in either case suggesting it arose out of the defendant's raping his subordinate. These bare claims of assault and battery are hardly

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[1]Securities industry arbitrators are almost all white males, involved with the securities industry, over age 60, with no legal experience required. *See* Hill's petition at p. 13 n. 22.

[2]*Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20. (1991).

comparable to the rape allegation made by Hill in this case.

The analytical flaw in Brab's petition is its erroneous assumption that all claims with the label "tort" should be classified as arbitrable under *Gilmer*. However, it is not the legal label assigned to the claim but the substance of the underlying allegations that determine whether the claims are arbitrable under the FAA. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 622 n. 9, (1985)

The Court of Appeals was clearly correct in its view that Hill's rape claim against Brab was "independent of the employment relationship" and therefore not subject to arbitration. Where the Court of Appeals went wrong was its refusal to find that the subsequent retaliation claims against Brab and his colleagues also arose out of the alleged rape. (*See* Hill's petition, at pp. 14-18)

3. The Court Of Appeals Decision Requires Piecemeal Resolution Of The Dispute

There is one point in Brab's argument on which there is agreement. It is true that the Court of Appeals' opinion requires piecemeal resolution with its attendant burdens on the parties. As noted by the Court of Appeals, however, an arbitration agreement will not be expanded merely for the sake of efficiency and piecemeal resolution will be the result if required by the contract. *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 24 (1983)

It is appropriate to point out, in contrast, that the drawbacks of piecemeal resolution are avoided under voluntary arbitration as suggested in Hill's petition. (*See* pp. 5-12) By voluntarily selecting arbitration after the dispute has arisen, the parties have the opportunity to shape the process to resolve all the issues involved.

CONCLUSION

This Court should review the Kentucky Court of Appeals decision for the reasons stated in Hill's petition, not because there was any error in its holding that Hill's being raped was outside the scope of her employment.

Respectfully submitted,

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October 14, 1997